



California Fair Political Practices Commission

December 2, 1988

Mary Jo Levinger
Town Attorney
P.O. Box 949
Los Gatos, CA 95031

Re: Your Request for Advice
Our File No. A-88-390

Dear Ms. Levinger:

You have requested advice on behalf of councilmembers Thomas J. Ferrito and Robert L. Hamilton about application of conflict of interest provisions of the Political Reform Act (the "Act")^{1/} to their duties on the Town Council of the Town of Los Gatos.

QUESTION

Mr. Ferrito and Mr. Hamilton operate businesses in the Los Gatos central business area. This area is part of a parking assessment district.

Is Mr. Ferrito or Mr. Hamilton disqualified from participating in decisions to implement plans for the parking assessment district, such as selecting a consultant, approving plans, setting parking fees or acquiring land?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

CONCLUSION

Mr. Ferrito and Mr. Hamilton are disqualified from any decision that will have a foreseeable and material financial effect, different from the effect on the general public, on any economic interest.

Based on the facts provided, a decision to select a consultant will not have a foreseeable effect on either Mr. Ferrito's or Mr. Hamilton's economic interests. Therefore, both councilmembers may participate in a decision to select a consultant.

Other decisions, however, may foreseeably and materially affect their economic interests. The councilmembers are disqualified from any decision which would have a reasonably foreseeable material financial effect on their economic interests.

FACTS

In previous advice letters we reviewed Mr. Ferrito's and Mr. Hamilton's economic interests . (See Levinger Advice Letter, No. A-87-061 and Hill Advice Letter, No. A-87-110, copies enclosed.) Mr. Ferrito's law practice is an investment interest and a source of income. He also has a real property interest in the property he leases for his office space.

Mr. Hamilton's drapery and shade shop is an investment interest and a source of income. Mr. Hamilton's clients also are sources of income. Based on information previously provided, the lease for his business is a periodic tenancy of one month or less; thus, the lease is not an interest in real property for purposes of the Act.

Since the previous advice letters, Los Gatos has won a lawsuit challenging formation of the parking assessment district. The town council now will begin implementing a plan for the district. Examples of implementation decisions are: (1) selecting a consultant, (2) approving the consultant's plans, (3) approving parking fees, and (4) acquiring land. The consultant will provide expert advice about structural and soil engineering, surveying, design, utilities, and preparation of contract documents, and will design plans for installing parking control devices, two surface parking lots, and a two-story parking garage.

You have advised us to assume land acquisition decisions will require a four-fifths vote by the council.^{2/}

ANALYSIS

Section 87100 prohibits any public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable the decision will have a material financial effect, different from the effect on the general public, on the official or a member of his immediate family or on any economic interest, as follows:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

^{2/} In your letter, you initially posed a question about interpretation of Code of Civil Procedure Section 1245.240. On November 7, 1988, you withdrew that question and instead assumed for purposes of this analysis that the four-fifths vote is required. Because Code of Civil Procedure Section 1245.240 is not part of the Act, we would be unable to provide guidance as to its interpretation. (See Section 83111; Regulation 18329(c), copy enclosed.)

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103.

Mr. Ferrito's law practice is an investment interest and a source of income. (Section 87103(a) and (c).) He also has a real property interest in the lease for his office space. (Sections 82033 and 87103(b).) Mr. Ferrito will be disqualified from any decision that will have a foreseeable and material financial effect on any of these interests.

Mr. Hamilton's drapery and shade shop is an investment interest and a source of income. (Section 87103(a) and (c).) Mr. Hamilton's business clients also are sources of income. (Section 82030.) Mr. Hamilton will be disqualified from any decision that will have a foreseeable and material financial effect on any of these economic interests.

Foreseeability

The effect of a decision is foreseeable if there is a substantial likelihood it will occur. An effect does not have to be certain to be foreseeable. If an effect were a mere possibility, however, it would not be foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, 206-207, copy enclosed.)

In your letter, you listed four types of upcoming decisions. One decision is to select a consultant who will provide technical expertise and will design plans for the parking assessment district. We have no information that the choice of a particular consultant foreseeably will affect either councilmember's economic interests. Therefore, both councilmembers may participate in the decision to select a consultant. Of course, please let us know immediately if facts exist which lead to a different conclusion.

Decisions to approve plans for the district, to set parking fees, or to acquire land, however, foreseeably could affect either councilmember's economic interests. For example, a plan to place a parking lot across the street from a councilmember's business will have a foreseeable effect on his business. (Gordon Advice Letter, No. I-87-223, copy enclosed.) For this reason, Mr. Ferrito and Mr. Hamilton must examine each decision to determine whether it will have a material financial effect on any of their economic interests.

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Materiality

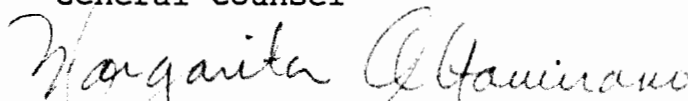
Enclosed are Regulations 18702 through 18702.6 which provide guidelines for determining whether the financial effect of a decision will be material. Mr. Ferrito and Mr. Hamilton should consult these regulations to determine whether a decision's effect on an economic interest will be material.

For example, if the consultant's plans place a parking lot next door to Mr. Hamilton's business, a decision to approve those plans will have a financial effect on Mr. Hamilton's business. Because Mr. Hamilton owns a small business, he should use guidelines in Regulation 18702.2(g) to assess whether the financial effect on his business will be material. Based on subdivision (g), Mr. Hamilton will be disqualified from a decision that will result in an increase or decrease in a fiscal year of \$10,000 or more in gross revenues to his business.

I hope this letter provides the councilmembers with adequate guidance. Please call me at (916) 322-5901 if you have any questions about this letter.

Sincerely,

Diane M. Griffiths
General Counsel

A handwritten signature in cursive script, reading "Margarita Altamirano".

By: Margarita Altamirano
Counsel, Legal Division

DMG:MA:aa

Enclosures

FPPC
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TOWN of LOS GATOS

Office of the Town Attorney
(408) 354-6880

October 7, 1988

Ms. Kathryn Donovan
California Fair Political Practices Commission
428 J Street, Suite 800
P.O. Box 807
Sacramento, CA 95804-0807

Dear Ms. Donovan:

I am writing on behalf of Councilmembers Thomas J. Ferrito and Robert L. Hamilton to request your advice on issues that are involved in the Town of Los Gatos' efforts to implement its plan for a Downtown Parking Assessment District. Councilmember Ferrito's address is 9 Simons Way, Los Gatos, California, 95030 and Councilmember Hamilton's address is 368 Bella Vista Avenue, Los Gatos, California, 95030. I would appreciate a written advice letter that expresses the opinion of the California Fair Political Practices Commission on the questions listed below.

FACTS

The Town of Los Gatos recently prevailed in a lawsuit that challenged the Town's plan for the formation of a Downtown Parking Assessment District. The Town is now proceeding to implement the plan for the District.

During the formation phase, questions concerning financial conflicts of interest for two Town Councilmembers were referred to your office. (Copies of the letters that you sent in response to those questions are enclosed.) In the letter that you sent to me on March 19, 1987 you concluded:

Based on the facts you have provided, Councilmembers Ferrito and Hamilton must disqualify themselves from participating in decisions concerning the formation of the parking assessment district and the urgency interim zoning ordinance. If participation of one of the disqualified councilmembers is legally required as to a particular decision, a method of random selection may be used to determine which councilmember may participate.

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The facts on which that advice was based remain essentially unchanged. (Please refer to your summary of the facts on pages 2 and 3 of the letter that you sent to me on March 19, 1987.) When analyzing the potential for a material financial effect on a Councilmember, please consider the fact that a no vote by the Town Council on certain issues would effectively terminate the plan for the Downtown Parking Assessment District (e.g. if the Town Council does not vote to hire a consultant, the plan for the Downtown Parking Assessment District could not be implemented.) Consequently, there would not be any assessments against property located within the boundaries of the Downtown Parking Assessment District.

Councilmember Hamilton believes that he can relocate his business for less than \$2,500.00. However, the decision to implement, or not to implement, the plan for the Downtown Parking Assessment District could still preclude a material financial effect on a source of income to him. When the Town Council voted on the plan for the formation of the Downtown Parking Assessment District, Councilmember Hamilton voluntarily disqualified himself from participation because he received more than \$250.00 in income from sources that owned property within the boundaries of the Downtown Parking Assessment District. See Government Code Section 87103(c).

REQUEST FOR ADVICE

Conflict of Interest Issues

Please state the position of the California Fair Political Practices Commission on the following questions:

1. Is it necessary for Councilmember Ferrito to disqualify himself from participation in decisions concerning the implementation of the Town's plan for the Downtown Parking Assessment District?
2. Is it necessary for Councilmember Hamilton to disqualify himself from participation in decisions concerning the implementation of the Town's plan for the Downtown Parking Assessment District?

In your response to questions 1 and 2, please consider the following decisions that must be made by the Town Council to implement the Town's plan for the Downtown Parking Assessment District:

1. Selection and approval of a consultant. The consultant will design a plan for the installation of parking control devices, two surface lots, and a two story parking structure. The consultant will provide technical expertise in the areas of structural engineering, soils engineering, survey, design, utilities, and contract documents preparation.

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2. Approval of plans designed by the consultant.
3. Approval of rates to be charged for metered parking.
4. Approval of land acquisition.

The actions listed above may not include all of the decisions that must be made or approved by the Town Council to implement the plan for the Downtown Parking Assessment District.

Statutory Interpretation

If it is determined that either Councilmember Ferrito or Councilmember Hamilton must not participate in a particular land acquisition decision, then we further request that a question of statutory interpretation be addressed. Code of Civil Procedure Section 1245.220 provides, in pertinent part, "[a] public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity" The effect of Code of Civil Procedure Section 1245.220 is to require the Town Council to adopt a resolution of necessity before eminent domain proceedings are commenced to acquire land for the Downtown Parking Assessment District.

The question of statutory interpretation concerns compliance with Code of Civil Procedure Section 1245.240. Code of Civil Procedure Section 1245.240 states "[u]nless a greater vote is required by statute, charter, or ordinance, the resolution shall be adopted by a vote of two-thirds of all the members of the governing body of the public entity." One possible interpretation of this statute is that two-thirds of the entire Town Council must vote to approve the resolution of necessity. Another possible interpretation is that only two-thirds of the Councilmembers eligible to participate in the decision on the resolution of necessity must vote for approval.

There are five members of the Town Council. If the first interpretation is applied, then there can be no approval of a resolution of necessity with less than four votes. In such instance, a fourth Councilmember must be chosen at random to participate. If the second interpretation is applied, then a resolution of necessity could be passed with only two of three eligible votes.


If any of the Councilmembers are disqualified from participation in a decision whether to adopt a resolution of necessity, then the question of the proper interpretation of the two-thirds vote requirement will need to be addressed.

Please contact me if there is any additional information that I can provide. Understanding that your office is experiencing a staff shortage, please let me

Ms. Kathryn Donovan
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know as soon as possible how long it will take to provide me with a written advice letter in response to these questions.

Very truly yours,


MARY JO LEVINGER
Town Attorney

cc: Mayor and Councilmembers
Deborah Swartfager, Town Manager
Ron Zapf, Town Engineer
Lee Bowman, Planning Director

FPFC

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**TOWN of LOS GATOS**

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Very truly yours,

A handwritten signature in cursive script, appearing to read "Mary Jo Levinger".

MARY JO LEVINGER
Town Attorney

cc: Mayor and Councilmembers
Deborah Swartfager, Town Manager
Ron Zapf, Town Engineer
Lee Bowman, Planning Director



California Fair Political Practices Commission

October 13, 1988

Mary Jo Levinger
Town Attorney
P.O. Box 949
Los Gatos, CA 95031

Re: 88-390

Dear Ms. Levinger:

Your letter requesting advice under the Political Reform Act was received on October 11, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margarita Altamirano, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Katherine E. Griffiths
Diane M. Griffiths
General Counsel

DMG:plh
cc: Thomas J. Ferrito
Robert L. Hamilton